

Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Appeal From Order No: 130 Of 2004

The Oriental Insurance Company Limited,
Divisional office Haldwani,
District Nainital through its
Divisional Manager.

-----**Appellant**

Versus

1. Shiv Dutt son of Shri Radha Krishana,
R/o- Village-Bindu Khatta East,
Ghoranala, Lal Kuwan,
District Nainital.

-----**Claimant/Respondent**

2. Vinod Kumar,
Son of Pitambar Joshi,
R/o Joshi Farm, Mota Haldu,
Wakulia, Tehsil- Haldwani,
District-Nainital.
(Owner)

-----**Respondent/Opposite Party**

Sri Pankaj Purohit, Advocate, learned counsel for the appellant
Sri P.S. Rawat, Advocate, learned counsel for the respondents.

Coram: **Hon'ble Irshad Hussain, J.**
 Hon'ble B.S. Verma, J.

Dated: 20.12.2004

(Per Hon'ble B.S. Verma, J.)

This appeal has been preferred Under
Section-173 of the Motor Vehicles Act-1988 (in short the
Act) against the judgment and award dated 28.2.2004
passed by Sri R.C. Khulbe, learned Motor Accident
Claim Tribunal/Additional District Judge/Fast Tract
Court-I, Haldwani, District-Nainital in Motor Accident

Claim Case No. 127 of 2003, whereby the learned Tribunal awarded compensation of Rs. 8,93,200/= along with interest @ 9% per annum against the appellant. Aggrieved, the Oriental Insurance Company Limited has come up in the appeal.

Claimant Shiv Dutt on 12th May, 2003 was going to his house along with his elder brother Puran Chandra, daughter Shanti and sister Bhagirathi Devi and they reached near Motar Haldu at about 4:00 P.M., truck (dumper) No. HR-38 C-8869 then driven rashly and negligently by its driver ran over him and his right leg was crushed. The petitioner was admitted in Government Hospital, Haldwani and later-on his right leg was amputated from thigh. The petitioner was selling the milk and was doing agriculture work from which he used to earn about 200/= per day. Due to accident, he has become disabled to do any work. The respondent /claimant preferred claim petition for Rs. 8 Lakh alleging therein that his right leg was amputated from thigh leading to total disablement.

Sri Vinod Kumar the owner of the vehicle filed his written statement alleging that his driver was having a valid licence and was driving the vehicle consciously and carefully.

The appellant has also filed a written statement and contended that the no information of accident was given to the appellant and the claimant has not impleaded the driver as party to the claim petition and it was upon the claimant to prove that that the driver was

having a driving licence and valid papers of the offending vehicle at the relevant time was validly plied on the route.

The learned Tribunal framed relevant issues. It held that the accident occurred due to rash and negligent driving by the driver of the offending truck (dumper) No: HR-38 C-8869 and that the offending truck was insured with the Oriental Insurance Company Limited. Ultimately compensation of Rs 8,93,200/= along with 9% interest was awarded.

The learned counsel for the appellant assailed the impugned award on the ground that the evidence on record indicate that claimants sustained multiple fractures in his right leg and since his leg has been amputated by the doctors below middle of thigh it is a case partial disablement as defined at serial No. 19 of part-II of Schedule-I of Workmen's compensation Act-1923. According to the schedule the percentage of the loss of the earning capacity for this injury is 60% The learned Tribunal while assessing the compensation failed to take note of this legal provision and thus wrongly calculated the compensation. He further contended that the percentage of disability has been shown 100% in the certificate dated 18.1.2004 whereas the certificate issued by same authority on 17.5.2003, the disability was shown 60%.

Learned Counsel for the respondent gave an explanation that the earlier disability certificate of 60% was issued when the claimant was under treatment and

that subsequently by the board of medical officers the disability was assessed as 100%. He also argued that the appeal is not maintainable in view of the Appex Court judgment in the matter of National Insurance Company, Chandigarh Vs. Nicolletta Rohtagi and others, (2002) 7 SCC Page 456 on the ground that the claimant has not moved an application under section-170 of Act and that even the appellant has not pleaded that there is collusion between the insured and the claimant.

The only question is whether the appeal under section- 173 of the Act is maintainable or not because it is confined only to the quantum of the compensation awarded by the M.A.C. Tribunal. It was also argued on behalf of the claimant/respondent that only ground on which the insurance company can defend the claim petition is breach of the condition of policy as provided by 149 (2) of the Act. He further argued that even the conditions of section 170 of the Act are not satisfied and therefore the appeal is not maintainable.

We find merit in the preliminary objection raised on behalf of the respondent. In the view of the said judgment of the Appex Court it has been held that the Insurance Company can defend the claim petition only on the ground of breach of condition of police or on the ground that the policy is void for reasons given in section 149(2) of the Act. The Insurance Company cannot avoid its liability on any grounds except those mentioned in section 149 (2) of the Act. Further the insurer has no right to file an appeal to challenge the quantum of

compensation or the finding of the Tribunal as regards negligence or contributory negligence of the offending vehicle except in cases where section 170 is applicable that apart, in cases where in the course of inquiry the Tribunal is satisfied that there is collusion between the claimant and the person against whom the claim has been made or if the Tribunal is satisfied in the course of inquiry that the person against whom the claim has been made has failed to contest the claim, the Tribunal may for resign to be recorded in writing implead the insurer and in that case it is permissible for the insurer to contest the claim on the grounds which are available to the insured. Therefore, where conditions precedent to section-170 are satisfied and the award is adverse to the insure, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence on the part of the offending vehicle. Oriental Insurance Company has filed this appeal only on the ground of quantum of compensation awarded by Tribunal. Further the conditions precedent to section 170 are not satisfied, therefore, we are of considered view that the Appeal is not maintainable.

The appeal is accordingly dismissed..

The amount deposited by the Insurance Company shall be remitted to the M.A.C.T. concerned for being paid to the claimant.

(B.S. Verma, J.)

(Irshad Hussain, J.)

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